

1 JUDGE SIPPEL: Suppose in that
2 situation with the employment decision,
3 supposing the employer went to Princeton and
4 M went to Princeton. And W went to someplace
5 else, Harvard, wherever. So he hires the guy
6 because he wants Princeton.

7 MR. PHILLIPS: If they're
8 materially equivalent considerations, they're
9 similarly situated, if a degree between
10 Harvard and Princeton and I would submit that
11 the degree between Harvard and Princeton
12 doesn't matter --

13 JUDGE SIPPEL: I didn't go to
14 Princeton, but I've talked to people who went
15 there.

16 MR. PHILLIPS: I didn't either.
17 And I think they're all very smart when they
18 do, Your Honor, but if there's not a material
19 distinction to the decision, then yes, Your
20 Honor, there's discrimination.

21 In our case, Your Honor, Comcast's
22 decision to restrict The Tennis Channel is on

1 this side of the equation. Comcast on this
2 side of the equation. Comcast's decision to
3 treat its own affiliates by giving them
4 carriage of up to 20 million subscribers as
5 opposed to 3 million subscribers is on this
6 side of the equation. Comcast's case would
7 have you focus only here, Your Honor, only on
8 the decision about whether or not to broaden
9 the distribution of The Tennis Channel
10 pursuant to its May 2009 proposal. They look
11 at that and say was there business
12 justification to deny them?

13 In order to determine
14 discrimination, Your Honor, you can't just
15 look here though. You've got to look at the
16 decision made on this side of the house as
17 well and compare them.

18 In other words, Your Honor, what
19 you've got to know is the test that they apply
20 to The Tennis Channel to reject the 2009
21 proposal, on whatever basis, if you applied
22 those tests, if you applied those tests to

1 Comcast's own similarly situated affiliated
2 networks would they also have passed?

3 Now at this point in time, Your
4 Honor, unfortunately, I'm going to start
5 getting into some of those specific facts of
6 the case. But I can tell you one of the
7 things I can try to tell you is that what you
8 will hear is evidence that The Tennis Channel
9 on this side of the case is not only not going
10 to be broadly distributed, but will never be.

11 JUDGE SIPPEL: Repeat that,
12 please?

13 MR. PHILLIPS: The Tennis Channel
14 -- the decision made in 2009 was not to
15 broadly distribute them and the testimony will
16 show that it's just not going to happen. And
17 in order to go into the details of that
18 testimony, Your Honor, I'm afraid I can't
19 without going into the highly confidential
20 designated material from the record.

21 JUDGE SIPPEL: All right. I just
22 want to be sure, The Tennis Channel you say

1 will not be broadly distributed because of a
2 decision made in 2009 and that is to refuse to
3 put The Tennis Channel on the preferred tier,
4 is that right?

5 MR. PHILLIPS: Yes, Your Honor.

6 Let me back up for a second. After all, what
7 we're here for after the hearing order is the
8 decision in Comcast in June of 2009 to reject
9 The Tennis Channel's proposal to broadly -- to
10 move it from the limited premium sports tier,
11 which has very restricted distribution and for
12 which subscribers must pay an extra \$5 or so,
13 and to move it down to a more broadly
14 distributed tier as Comcast's owned wholly-
15 owned channels, including The Golf Channel and
16 Versus are treated. Those channels are
17 distributed on the broadest, on nearly the
18 broadest possible tiers, nearly all of
19 Comcast's viewers, so approximately 20 million
20 viewers. The Tennis Channel, as opposed to
21 The Golf Channel, is limited to less than 3
22 million viewers on the sports tier.

1 JUDGE SIPPEL: Okay, now let me
2 ask this question just for clarification.
3 Does not Comcast have a third sports channel?

4 MR. PHILLIPS: It has several
5 sports channels in which it owns equity
6 interests, Your Honor, and we'll get to all of
7 those. There's The Baseball Channel and The
8 Hockey Channel, in particular. And those
9 channels also, as I'll get into, are relevant
10 to this determination. I'm hesitant, Your
11 Honor, because getting into the facts and I'm
12 concerned may invoke confidential information.

13 JUDGE SIPPEL: I'm just looking
14 for your broad-brush approach here. You
15 focused heavily on Versus and Golf. And I
16 mean that's all in your papers that you've
17 submitted. I'm not hearing too much about
18 these others.

19 MR. PHILLIPS: If I may --

20 JUDGE SIPPEL: I'm just curious as
21 to why I'm not hearing too much about the
22 others?

1 MR. PHILLIPS: Let me try to
2 proceed on this, Your Honor. Now you're going
3 to hear, Your Honor, some incontrovertible
4 proof of discrimination which I just went over
5 in passing. You're going to hear evidence
6 that shows that with respect to Comcast
7 affiliated channels, Comcast Cable network,
8 the distributor, in fact, makes sure that
9 Versus, for example, gets broad distribution
10 because Versus has contractual clients. That
11 evidence is incontrovertible.

12 You're going to hear that, in
13 fact, Comcast, the distributor, helps out in
14 channel placement. I don't live down here in
15 D.C., but I understand that down here in D.C.,
16 that The Golf Channel and Versus are on
17 Channels 11 and 7. I think The Tennis Channel
18 is on Channel 735 out of 736. Well,
19 obviously, channel placement is an important
20 thing. One of the claims that we've made is
21 that there's discrimination on that basis.
22 And what you'll hear, Your Honor, is evidence

1 that, in fact, Comcast, the cable distributor,
2 in fact, helps Versus and Golf Channel get
3 that favorable channel placement, next to such
4 -- the king of sports channels, ESPN.

5 But I'm not going to focus on that
6 right now, Your Honor, because what I'd like
7 to focus on, in fact, is the issue in
8 particular in this case which is the May 2009
9 offer by The Tennis Channel and the June 2009
10 rejection of that offer by Comcast where
11 Tennis Channel proposed to be moved to a more
12 broadly distributed tier at a certain part.

13 I'd like to go through for a
14 little bit of history, Your Honor. Your Honor
15 may already know this, but just if I may. The
16 Golf Channel and Versus were founded in the
17 mid-1990s. Comcast had ownership interests in
18 them shortly after their founding and now
19 wholly owns them. The Golf Channel was
20 struggling at the time of its founding and
21 indeed, and this is undisputed, Comcast moved
22 Golf Channel down from a narrow tier to a much

1 more broadly distributed tier in order to help
2 it, in order to try to save the channel
3 because it was foundering where it was in the
4 restricted tier.

5 The Tennis Channel, my client, had
6 a different start. It started in 2003 as a
7 small, independent network. And it sought and
8 gained distribution there in the early days
9 from some of the major distributors and over
10 time it invested in its company. It invested
11 in its programming and it invested in the
12 right, and it invested in the quality of its
13 programming. Over the next few years, it
14 decided to invest heavily in such things like
15 high definition and I won't because of the
16 public nature of this describe the millions of
17 dollars that it invested in things like high
18 definition and in increased tennis programming
19 rights, but suffice it to say generally, it
20 made heavy investments in its quality and the
21 rights that it acquired, so much so that as
22 further deals took place for distribution

1 among other distributors, the distributors in
2 the last few years recognized its quality and
3 distributed it much more broadly than Comcast.

4 Comcast, however, --

5 JUDGE SIPPEL: Can you give me an
6 example of some of those distributors?

7 MR. PHILLIPS: Perfect examples,
8 Your Honor, AT&T which is a , but
9 automatically going to ; DirectTV,
10 where I believe is at ;
11 Verizon, where it is in a much more
12 significant percentage; Dish Network, where it
13 is significantly distributed. Even one of the
14 MSOs, Cox, it's distributed to on the
15 sports tier. But it's a sports tier, an
16 entertainment tier, it's much more broad than
17 Comcast's narrow premium sports tier.

18 JUDGE SIPPEL: What are these
19 percentages referring to? Like you have AT&T
20 at ? of what?

21 MR. PHILLIPS: Of the subscribers
22 to the service, to its cable subscribers.

1 JUDGE SIPPEL: To its universe?

2 MR. PHILLIPS: Yes. To the people
3 who buy cable television from them.

4 JUDGE SIPPEL: I understand that.
5 The experts call them eyes. I don't know why,
6 but they call them eyes.

7 MR. PHILLIPS: I always get
8 confused with that and I don't know if I'm
9 supposed to tell it or not.

10 JUDGE SIPPEL: No, you're doing
11 great. Thank you very much. So it's
12 of the total -- okay, gotcha.

13 MR. PHILLIPS: And Your Honor,
14 you'll hear testimony about this from experts
15 and from Mr. Solomon about the distribution
16 numbers and about how they've achieved broad
17 distribution in the last few years as other
18 distributors have come to realize the value
19 and quality proposition.

20 For example, Tennis Channel, as of
21 2008, had acquired the last of the four major
22 tennis tournaments. It now has rights to

1 significant parts, to air significant parts of
2 all four major tennis tournaments, the U.S.
3 Open, the Australian Open, the French Open,
4 and Wimbledon.

5 JUDGE SIPPEL: I can see on my
6 broadcast, you know, I crank it up and I take
7 those rabbit ears and everything like that, I
8 can get the U.S. Open and I believe Wimbledon,
9 I can get that on a broadcast station.

10 MR. PHILLIPS: Yes, Your Honor.
11 You can get the finals of those.

12 JUDGE SIPPEL: Oh, I see.

13 MR. PHILLIPS: But the rest of the
14 rights of the rest of the tournaments, other
15 significant parts of it are on The Tennis
16 Channel. The Golf Channel, by comparison,
17 Your Honor, for the four majors in golf, The
18 Golf Channel doesn't have any of those
19 tournaments. Doesn't have rights to air any
20 of them. And that's one of the channels we're
21 compared to here. We have less distribution.

22 The Tennis Channel not only

1 invested and got high definition television --
2 the most important thing about sports
3 television, Your Honor, as you know from the
4 previous times we've been here is wide event
5 programming, the sports themselves. The
6 Tennis Channel has as much of that as any of
7 its competitors, but in addition to that, Your
8 Honor, it also has very high quality, live
9 event programming. When it shows it -- it's
10 had an Emmy nomination for it. The live event
11 programming it does is of such high quality
12 that it is, in fact, they produce it to be
13 broadcast by ESPN and NBC which is further
14 testament.

15 The Tennis Channel, as I said, it
16 started in 2003. It began being distributed
17 on the narrow sports tier by Comcast pursuant
18 to the contract -- we don't claim there's a
19 contract violation -- in 2005. And it
20 continued to invest and grow and evolve and
21 finally after it had finished the rollout of
22 HDTV and it had gotten the rights to all four

1 of the major tennis tournaments, some of the
2 rights, not the finals, in May of 2009, it
3 decided or in early 2009, it decided that the
4 time had come to approach Comcast because it
5 had thought that the case for broader
6 distribution was compelling.

7 So in May 2009, after a few
8 preliminary meetings and telephone calls to
9 set up a meeting, there was a meeting in
10 Comcast in Philadelphia in which my client
11 attended. I believe Mr. Carroll's client
12 attended, in which The Tennis Channel
13 executives offered to cut their license fees
14 substantially in return for broader
15 distribution.

16 It was a really good deal, as Your
17 Honor will hear when we're in private session.
18 Because there were significant cuts. And
19 without revealing those numbers, those cuts
20 made Tennis Channel far less expensive on a
21 per subscriber basis, on an aggregate basis,
22 on any basis, than The Golf Channel and

1 Versus.

2 Indeed, it was already less
3 expensive by a multiple, but it became far
4 less so when you took the proposal in May
5 2009.

6 A month later, Comcast declined
7 that offer. They never gave a counter offer
8 other than to repeat that Tennis Channel will
9 have the right to go to individual systems and
10 seek further distribution, the right that
11 Tennis Channel had always had, but because
12 decisions were made centrally, it had never
13 been able to gain any traction on it.

14 So today, The Tennis Channel
15 remains in the vast majority of Comcast
16 systems around the country. The Tennis
17 Channel remains distributed on a small premium
18 sports tier for which subscribers must pay an
19 extra \$5 every month. It's distributed to
20 approximately 3 million subscribers. The Golf
21 Channel and Versus, by contrast, are
22 distributed broadly throughout the country by

1 Comcast to its wholly-owned systems and by
2 mandate, from the top, from Comcast in
3 Philadelphia, it is distributed to very highly
4 penetrated level reaching approximately 20
5 million as opposed to 3 million.

6 There's no dispute about those numbers, Your
7 Honor, about the wide role of this disparity
8 of treatment.

9 Now I want to come back to what I
10 call my discriminatory equation here because
11 where this matters is when you hear from
12 Comcast witnesses, the rationales that are
13 given for why the different treatment. Now
14 for the purpose of my explanation here, you'll
15 forgive my writing, Your Honor.

16 JUDGE SIPPEL: Oh yes, you are
17 forgiven. Easy to follow. Thank you. Very
18 easy.

19 MR. PHILLIPS: Okay. In order to
20 know whether these justifications that Comcast
21 offers for making this decision of
22 discrimination, you can't just look at the

1 decision on The Tennis Channel. You also have
2 to look at the decisions made here. Now some
3 of the justifications that are offered,
4 particularly by Comcast experts were things
5 that were never considered at the time.
6 There's no evidence that they were considered.
7 Mr. Bond, who made the decision and admits he
8 didn't consider it. So with those sort of
9 what I call post hoc rationalizations, one of
10 them is Mr. Orszag, you remember him from the
11 last time, will tell you about revealed
12 preferences. Those weren't applied at the
13 time.

14 The others that were applied at
15 the time I'd like to talk about for a second.
16 One of them is what I call the date test. The
17 date test is very important to Comcast.

18 JUDGE SIPPEL: Which side of that
19 equation are we on?

20 MR. PHILLIPS: We're talking first
21 about The Tennis Channel.

22 JUDGE SIPPEL: Okay, so we're on

1 the W side.

2 MR. PHILLIPS: Comcast says tell
3 The Tennis Channel fails the date test. Let
4 me explain what the date test is for a second.
5 Comcast says look, Versus and Golf were
6 founded and carried in 1995. It was a far
7 different universe and time in 1995. It was
8 far easier in 1995 to get wide distribution.
9 Factually, I don't think that's true. We can
10 go into that, but let's just take it for what
11 it is for a second. The 1995 date test. The
12 Tennis Channel didn't come around until 2003
13 and Comcast in 2005. According to Comcast,
14 the market had changed considerably.

15 And Mr. Carroll and his colleagues
16 will very strenuously tell Your Honor that
17 this date test, 1995 matters.

18 JUDGE SIPPEL: That's eight years,
19 right?

20 MR. PHILLIPS: Yes, Your Honor.
21 It's eight years, but they'll tell you this
22 test matters a lot, except when it doesn't,

1 Your Honor. When does it not apply? It
2 doesn't apply when Comcast owns the channel
3 because if we take The Baseball Channel, Your
4 Honor, The Baseball Channel is a new network
5 in 2009. Comcast acquired an ownership
6 interest in The Baseball Channel when it
7 launched in 2009. This wasn't 1995. This
8 wasn't even 2005. It was after that, 2009.

9 So after Comcast acquires the
10 ownership interest in The Baseball Channel,
11 guess where it gets distributed? On its broad
12 digital classic tier with approximately 50
13 percent of Comcast subscribers, not on the
14 sports tier. Comcast owns an interest.

15 Let's also look The Hockey
16 Channel, Your Honor. The Hockey Channel was
17 like The Tennis Channel, off on that sports
18 tier with us, the limited sports tier for
19 years, until in 2008 Comcast bought
20 approximately 15 percent ownership interest in
21 The Hockey Channel. Guess what happened when
22 it bought that 15 percent ownership interest?

1 Guess what immediately happened thereafter,
2 Your Honor? The Hockey Channel got
3 distributed on Comcast to that broadly
4 distributed digital classic tier reaching 10
5 million Comcast subscribers.

6 So they say that 1995 is the
7 reason that -- or was a reason that The Tennis
8 Channel fails the test, but like the woman in
9 my hypothetical, the woman who came in for the
10 job, this is a test that doesn't get applied
11 here because if it did, you wouldn't find The
12 Hockey Channel and The Baseball Channel which
13 Comcast owns interest in being broadly
14 distributed.

15 JUDGE SIPPEL: I guess you're
16 saying really -- I don't want to put words in
17 your mouth, but it sounds like you're saying
18 that they were -- baseball and hockey were
19 just arbitrarily assigned the favorable
20 distribution tier?

21 MR. PHILLIPS: I don't think it
22 was arbitrary, Your Honor. I think it was

1 because Comcast has an equity interest in it.

2 They got an equity interest --

3 JUDGE SIPPEL: That's arbitrary in
4 the sense that there's no legitimate business
5 interest.

6 MR. PHILLIPS: Your Honor, when
7 you take a channel on the small tier and you
8 move it to a much broader tier, the channel
9 becomes much more valuable. It gets increased
10 distribution.

11 JUDGE SIPPEL: I understand that.

12 MR. PHILLIPS: It gets increased
13 advertising fees. Comcast captures a portion
14 of that value when it moves a channel in which
15 it owns an equity interest from the narrow
16 tier to a much more broadly distributed tier.

17 The Tennis Channel is not on that
18 widely distributed tier and Comcast doesn't
19 own any value in it, but the reason I point
20 this out is I call it the date test, Your
21 Honor, is because it's applied here, but it's
22 not applied here.

1 Let's talk about another test,
2 which is the cost benefit test. Unlike some
3 of these other tests I've mentioned which were
4 sort of brought up after the fact, there's no
5 evidence that they were ever applied in June
6 of 2009, the cost benefit test there is
7 evidence that it may have been applied. Mr.
8 Bond, who you remember last time when he
9 testified, testifies quite clearly that you
10 know he looked at The Tennis Channel's
11 proposal and he thought it was just too
12 expensive. It was going to increase the
13 license fees that Comcast would have to pay
14 The Tennis Channel significantly, and without
15 any corresponding benefit to offset those
16 fees. And that's what Mr. Bond has testified
17 in his deposition and you'll hear him testify,
18 too, here.

19 I'm going to be treading on this a
20 little gingerly, Your Honor, because I don't
21 want to have to give the numbers and so I'll
22 try to do this without them.

1 JUDGE SIPPEL: That's fine.

2 MR. PHILLIPS: If you apply the
3 cost benefit test, if you look at it, the
4 numbers for The Tennis Channel for the
5 aggregate fees that we charged in 2010 and you
6 look at that number, and then you look at
7 well, what's the number for The Golf Channel
8 and Versus, Your Honor? What were those
9 numbers of the fees that they would have to
10 pay in the same year for The Golf Channel and
11 Versus as opposed to The Tennis Channel?

12 Well, suffice it to say without
13 giving you the number, for The Golf Channel
14 it's many times what they would have to pay
15 for The Tennis Channel and for Versus, it's
16 many times plus what they would have to pay
17 for The Tennis Channel.

18 JUDGE SIPPEL: Are Versus and
19 Golf, are they wholly-owned subsidiaries? Are
20 they wholly-owned by Comcast?

21 MR. PHILLIPS: Yes, Your Honor.

22 JUDGE SIPPEL: Well, then how

1 could it cost more?

2 MR. PHILLIPS: Well, Comcast Cable
3 pays Comcast Programming.

4 JUDGE SIPPEL: Right.

5 MR. PHILLIPS: Fees for that.

6 JUDGE SIPPEL: Right.

7 MR. PHILLIPS: It's an accounting
8 entry, Your Honor. But it does cost more.

9 JUDGE SIPPEL: Does it really make
10 a difference though if it's all going
11 ultimately into the same pot?

12 MR. PHILLIPS: Your Honor, it
13 makes a difference in terms of the
14 discriminatory treatment.

15 JUDGE SIPPEL: All right, okay.
16 Whose stock are we talking about that has a
17 value? Is it Comcast Corporation?

18 MR. PHILLIPS: Your Honor, I think
19 what you'll hear is that Comcast will maintain
20 that it tries to maintain a very strict line
21 between the cable side and the programming
22 side, the network side, and others, so it

1 doesn't violate Section 616, because otherwise
2 --

3 JUDGE SIPPEL: If I buy a share of
4 Comcast stock and God forbid I won't --

5 (Laughter.)

6 JUDGE SIPPEL: At least not until
7 I retire --

8 MR. PHILLIPS: Actually, Your
9 Honor, I think I own some, but I can't sell
10 it.

11 JUDGE SIPPEL: That's perfectly
12 understandable. Maybe the prices aren't --

13 MR. CARROLL: Real preferences are
14 coming out.

15 (Laughter.)

16 JUDGE SIPPEL: Be very careful.
17 Be very, very careful.

18 MR. PHILLIPS: I am impressed with
19 their shrewd business dealings.

20 JUDGE SIPPEL: Let me ask you
21 this, though. You own some stock of Comcast,
22 what is it that you own? What is the public

1 looking to for trading value, stock value?

2 MR. PHILLIPS: Your Honor, I will
3 confess that I don't know how Comcast upper
4 corporate structure goes. But I don't really
5 think the stock value of Comcast is at issue
6 here. What's at issue here is how much does
7 Comcast charge for the distribution of and how
8 broad is the distribution of the networks that
9 it owns interest in, whether minority or
10 majority interest or wholly owned, versus how
11 much -- what it charges for networks that it
12 doesn't own. And I think that that is really
13 the target of Section 16 when it talks about
14 a distributor cannot discriminate on the basis
15 of affiliation or on the basis of non-
16 affiliation.

17 JUDGE SIPPEL: That's what the
18 language says.

19 MR. PHILLIPS: That's what the
20 language says.

21 JUDGE SIPPEL: Again, I don't want
22 to beat a dead horse on this, but when I think

1 when I'm going out to buy stock after I retire
2 and I want to buy Tennis Channel stock, do
3 they issue stock?

4 MR. PHILLIPS: They're not
5 publicly traded, Your Honor.

6 JUDGE SIPPEL: Okay, so I've got a
7 problem there.

8 (Laughter.)

9 JUDGE SIPPEL: I can't get stock
10 from The Tennis Channel.

11 MR. PHILLIPS: Well, Mr. Solomon
12 is going to testify here a little bit later
13 this morning.

14 JUDGE SIPPEL: That's okay, let's
15 assume that they are. All right, for this
16 purpose let's assume that they are. They're
17 traded at let's say 25 and I can get their
18 financial statements and get a rough
19 approximate as to how they reach those numbers
20 in the broad sense. They're going to have to
21 pay a -- they're not going to have to pay a
22 parent company anything. They're just one